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HAROLD B. WILLEY,

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1953

No. 611

COLLIN COUNTY LEVEE IMPROVEMENT DISTRICT NO. ONE, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Reply to the "Brief for the United States and the Reconstruction Finance Corporation in Opposition Presented by Collin County Levee Improvement District No. One, et al., Appellants."

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OPINION BELOW

The Opinion of the Court of Appeals (R. 22-24) is reported at *208 F. 2d 396.*

QUESTION PRESENTED

Whether, under the law of Texas, a lien to secure the payment of bonds issued by a levee improvement district existed upon lands within the district, before the taxes are assessed and amount due by each individual farm has been determined.

In Reply to the Section of the United States Brief Entitled —Constitutional and Statutory Provisions Involved

The Constitution of Texas, Art. 16, Section 59a(c) Vernon's Annotated Revised Civil Statutes of Texas (1925):

> "The Legislature shall authorize all such indebtedness as may be necessary to provide all improvements and the maintenance thereof requisite to the achievement of the purposes of this amendment, and all such indebtedness may be evidenced by bonds of such conservation and reclamation districts, to be issued under such regulations as amy (may) be prescribed by law and shall also, *authorize the levy and collection within such districts of all such taxes, equitably distributed, as may be necessary for the payment of the interest and the creation of a sinking fund for the payment of such bonds;* and also for the maintenance of such districts and improvements, *and such indebtedness shall be a lien upon the property assessed for the payment thereof;* provided the Legislature shall not authorize the issuance of any bonds or provide for any indebtedness against any reclamation district unless such proposition shall first be submitted to the qualified property taxpaying voters of such district and the proposition adopted."

The italicized portion of the above constitution provision shows that the Constitution of Texas directs that

levee district bonds shall be paid by the levy and collection of taxes within the district. This is the only way that either the constitution or the statutes provide for paying levee district bonds. There is no other method for paying off bonds.

The words "and such indebtedness shall be a lien upon the property assessed for the payment thereof," is the constitutional provision which creates or authorizes a lien on the lands for the payment of the bonds. This is talking about a tax debt or a debt to be discharged by the levy and collection of taxes. This provision says that the "indebtedness shall be a lien upon the property *assessed.*" In other words, the lien comes into existence with the assessment of the property for taxes. Let's see when this assessment takes place.

Art. 8012 of the Revised Civil Statutes of Texas (1925) under title of "Levying taxes" outlines two separate methods of levying taxes. The first paragraph of the statute outlines the procedure "When bonds have been issued by any levee improvement district, providing for the levy of taxes upon a benefit basis, * * *." The taxes for the Collin County Levee Improvement District No. One are not levied on a "benefit" basis so we are not concerned with this. The second and last paragraph of the statute provides:

> "When bonds shall have been issued by any levee improvement district, providing for the levy of taxes upon ad valorem basis, the commissioners' court of the county, if the district is wholly within one county, or, if the district is located in more than one county, then the commissioners' court of each county in which

> any portion of such district is located, shall levy and cause to be assessed and collected taxes upon all taxable property within such district, based upon the value of each piece of property as made for State and county purposes, which taxes shall be sufficient in amount to pay the interest on such bonds as it shall fall due, and to raise an additional fund which shall create a sinking fund sufficient to redeem and discharge such bonds at maturity; such levy may be made for or at the time of issuance of said bonds for each year throughout the life of the bond issue which shall be the rate of levy for each of such years until modified. Sinking funds shall from time to time be invested in such county, municipal, district or other bonds as other sinking funds may by law be invested in, or in the bonds of the series to which such funds apply, if offered for redemption before maturity upon terms deemed advantageous to the district by its supervisors or the court of jurisdiction."

The Collin County Levee Improvement District No. One levies taxes on an "ad valorem" basis. The photostatic copies of the bond transcripts filed by Reconstruction Finance Corporation in the trial court so designate. It has been assumed in the trial court and in the Circuit Court of Appeals by the levee district that all parties agreed that the tax levy was on an "ad valorem" basis. The taxes were and have always been levied on an "ad valorem" basis.

This being so, let's see the procedure the statutes of Texas dictate.

In Art. 8012 above quoted we find that the Commissioners' Court shall "levy and cause to be assessed and collected taxes upon all taxable property within such district,

*based upon the value of each piece of property as made for state and county purposes * * *."*

This is a clear statutory directive to use the State and County value of each individual farm in the levee district to figure that farm's levee tax.

Art. 7998 of the Revised Civil Statutes provides:

> "In all levee improvement districts providing for the levy of taxes upon an ad valorem basis, the taxable property shall be assessed at the same value as assessed for State and County purposes. In the assessment of taxes in such districts, and in all matters pertaining thereto or connected therewith, the county tax assessor shall have the same powers and shall be governed by the same rules, regulations and proceedings as are provided by the laws of this State for the assessment and collection of county and State taxes. And the county commissioners' court shall constitute the board of equalization for such levee improvement district or districts, and all laws governing boards of equalization for county and State taxing purposes shall govern such board or boards for such levee improvement districts. It shall be the duty of the county tax assessor of the county to assess all property within such levee improvement district and list the same for taxation in the books or rolls furnished him by the commissioners' court for that purpose, and return said books and rolls at the same time when he returns the other books and rolls of the State and county taxes for correction and approval * * *."

This statute by saying "in the assessment of taxes in such district, and in all matters pertaining thereto or connected therewith, the county tax assessor shall have the same powers and shall be governed by the same rules, regu-

lations and proceedings as are provided by the laws of this State for the assessment and collecting of county and State taxes * * *" clearly and definitely places levee district tax procedures under the County and State tax procedure statutes.

We have agreed that the bonded indebtedness is going to become a lien on the individual farms in the district when the individual farms are "assessed." Therefore our question becomes simply this: According to the Texas Statutes regulating County and State tax procedures when is the property "assessed" for taxes? Let's look at the statutes and see:

Art. 7151 (R. C. S. of Texas) says the landowner should render his property for taxes between January 1 and April 30 of each year.

Art. 7189 (R. C. S. of Texas) says:

> "Assessors of taxes shall, between the first day of January and the thirtieth day of April of each year, proceed to take a list of taxable property, real and personal in his county and *assess the value* (italics mine) thereof in the manner following, to-wit: * * *."

Art. 7190 to 7205 (R. C. S. of Texas) outlines in detail the method to be followed in *assessing* (italics mine) the various types of property.

Art. 7198 (R. C. S. of Texas) provides that the *assessing* (italics mine) must be completed "on the first day of June each year, or as soon thereofter as practicable."

Art. 7206 (R. C. S. of Texas) provides for equalization of taxes.

Art. 7219 (R. C. S. of Texas) requires preparation of tax rolls.

Art. 7255 (R. C. S. of Texas) requires the tax collector to begin the collection of taxes annually "on the first day of October, or so soon thereafter as he may be able to obtain the proper *assessment* (italics mine) rolls * * *."

These statutes which regulate the levee district taxes show clearly what is meant when the Constitution says "* * * and such indebtedness shall be a lien upon the property *assessed* (italics mine) for the payment thereof." This property is assessed each year for that year's taxes; no one knows how much the tax will be on any farm until the land owners render, the tax assessor assesses, the board equalizes and the assessment rolls are made up for each year. The amount of taxes varies from year to year on the same farm. It follows State and County value (Art. 7998, supra).

There is no Texas case construing this part of the Constitution on levee district taxes. There are many Texas cases saying when State and County Taxes become liens on real estate.

The Supreme Court in *State v. Farmer, 94 Tex. 232, 59 S. W. 541*, holds:

> "The lien of the State, under the provisions of the Constitution, arises out of the assessment of the property and does not exist until that assessment is made. It is the assessment made annually by the officers of

the state under and in accordance with the law which holds a lien upon the land. The word 'assessment' as here used evidently means the sum which has been ascertained as the apportioned part of the tax to be charged against the particular piece of property, but under our Constitution and the provisions of our statute, the word embraces more than simply the amount and includes the procedure on the part of the officials by which the property is listed, valued and finally the pro rata declared."

The case of *Freeman v. State, et al. (199 S. W. 2d 301)*, holds:

"This view is further fortified by the fact that the foreclosure of the tax lien on realty, followed by a sale thereof, is a harsh remedy, and to justify divesting an owner of his title, a strict adherence to the requirements of the law must be had. Only by such strict adherence can it be a judicial proceeding as contra-distinguished from a summary proceeding. As we construe the law relating the collection of delinquent taxes, antecedent things necessary to fix a valid tax lien, and consequent authority to foreclose it, must result only from what the tax records show. Due process requires as much. See also: Chisholm v. Adams, 71 Tex. 678, 10 S. W. 336; Miller v. Vance, 107 Tex. 485, 180 S. W. 739; Crocker v. Santo Consolidated School Dist., Tex. Civ. App., 116 S. W. 2d 750, Syl. 12-14; Broocks v. State, Tex. Civ. App., 41 S. W. 2d 714; Garza v. City of San Antonio, Tex. Com. App., 231 S. W. 697; Gifford Motor Co. v. Phillips, Tex. Civ. App., 55 S. W. 2d 1087; 40 Tex. Jur., pages 227-228, Para. 161 and 162.

"The rule is that taxes are not a lien upon property unless expressly made so, and this applies to special taxes in districts, as well as general taxes. Cooley, Taxation, pp. 865, 866, and authorities cited in footnotes; State v. Hunt (Tex. Civ. App.), 207 S. W. 636."

Texas Jurisprudence under the general topic of "Taxation," vol. 40, pg. 203, Sec. 145 says:

"A lawful assessment[12] is a prerequisite of a lien."[13]

Certainly a lien cannot come into existence without some law creating it. The Texas statutes and Constitution say that the lien is created on the property "assessed" and that this occurs annually for that year's taxes.

The United States is contending that the taxes were "assessed" with the issuance of the bonds for the entire life of the bonds. They are confusing "rate of levy" which is the amount of tax per $100 of value with "assessment" which is the application of the "rate of levy" to the "value." The "rate of levy" is set for the entire life of the bonds.

Art. 8012 says "* * * such levy may be made for or at the time of issuance of said bonds for each year throughout the life of the bond issue which shall be the rate of levy for each of such years until modified * * *."

The rate (that is amount of tax due per $100 of value) is set at the time the bonds are issued for each year throughout the life of the bonds (unless modified). But this rate which is set cannot be translated into amount of tax due on any particular farm until the farm is "valued." This takes place each year (see Arts. 7151, 7189, 7190, 7198, 7206, 7219 and 7255 of Texas Statutes supra).

Until this procedure is gone through *each year* no one knows the amount of tax each farm will owe. It can vary, common sense dictates that it will vary from year to year.

The total amount of debt is one definite figure, but the amount of this debt that each individual farm will owe is not definite and cannot be made definite until that farm goes through the tax mill each year. Therefore, to say that on July 12, 1950, when the declaration of taking was filed, at that instant the entire bonded indebtedness which was voted to be paid out of annual taxes through 1969, all became due at one time, and had to be paid by the individual landowners, is in effect saying to the individual landowner, "you pay your taxes for the next nineteen years, and do this, in spite of the fact that there is no way to determine the legal and proper amount of this tax."

The Constitution nor statutes of Texas provide for any such procedure. The landowners, when they voted the bonds, did not contemplate any such procedure. The entire matter was set up on a foundation of the landowner paying an annual tax. Could anything be more unjust than requiring him to pay nineteen years' future taxes on farm lands that he no longer has the benefits of and then just guessing at the amount he is required to pay?

On page 3 of the brief of the United States is quoted the first paragraph of Art. 8012 (R. C. S. of Texas 1925). This is the part of the statute that applies where bonds are issued by a levee district providing for the levy of taxes on "a benefit basis." Since our levee district levies taxes on an "ad valorem basis" this part of the statute has absolutely no application here.

In Reply to the Section of the United States' Brief Entitled—Argument

In the "Argument" of the United States, we find this statement on page 5:

> "With respect to the bondholders' claims under the Texas law, the entire indebtedness came into existence at the time the bonds were issued and the land within the district immediately became security for the fulfillment of the district's obligation."

We agree absolutely with this statement. It is correct. The entire indebtedness did come into existence at the time the bonds were issued and the land did immediately become security for the fulfillment of the district's obligation. But it only became security when that particular land's proportionate part of the tax burden became a definite figure that was translated into dollars and cents. The only time this happened was each year for that year's taxes. This is the obligation the landowners voted upon themselves. There is no law that changes it.

We next find this statement:

> "This is made clear beyond doubt in Hidalgo & Cameron Counties, etc. v. American Rio Grande Land and Irrigation Co., 103 F. 2d 509 (C. A. 5)."

This *Hidalgo and Cameron Counties* case is not a levee district case; the complete name of the district as given on *page 509, Vol. 103 Fed. 2d* is:

> "Hidalgo & Cameron Counties Water Control & Improvement District No. 9."

This is an irrigation district, not a levee district, as the court's opinion states on page 512 (2, 3): "The lengthy statutes relating to reclamation districts are collected in Revised Statutes of Texas, Art. 7880-1 et seq."

The title of this section of the statutes is "Water Control and Improvement Districts." These statutes require from pages 258 to 384 of Vol. 21 of Vernon's Statutes. They have no connection whatever with levee districts. The levee district statutes are Arts. 7972 to and including 8030, it is under these statutes that Collin County Levee Improvement District No. One was organized and functions.

In the *Hidalgo and Cameron Counties* case they were litigating some charges and assessments that the district had made for irrigation water it had delivered. The court, on page 512 (2, 3) said:

> "These charges and assessments are not taxes within the meaning of the Texas tax statutes."

The opinion then says that these districts may get their income from general taxation, from charges for water actually furnished, or from assessments on each irrigable acre (whether irrigated or not). The court then said:

> "These taxes unquestionably have a lien. They are not here involved. What is here involved are 'operation charges' for the water furnished and service rendered * * *."

This case is interpreting different statutes, dealing with a different type of district and is not concerned with what

the district owes its landholders but rather what the district's customers owe the district. It could hardly be considered as authority for any point in our case.

I agree with the statement of the United States that the question in cases *People of Puerto Rico v. United States, 134 Fed. 2d 267, certiorari denied, 320 U. S. 753,* and *People of Puerto Rico v. United States, 131 F. 2d 151, certiorari denied, 318 U. S. 775* was "the time of attachment of liens for Puerto Rican real estate taxes on lands taken by the United States." And that is exactly our question. Had the lien attached to our levee district individual farms for the total amount of the bonds, or did it attach each year as the taxes were "assessed" and the amount that farm owed determined? It happens that the question is fundamental and that in the two Puerto Rican cases is the only time it has ever reached this court.

The United States in its brief on page 6 says:

> "The court's interpretation of the Texas law was completely in accord with the views heretofore expressed by the Texas courts. Brown County Water Improvement District No. 1 v. Austin Mill & Grain Co., 138 S. W. 2d 523; Dallas Joint Stock Land Bank v. Ellis County Levee Improvement District No. 3, 55 S. W. 2d 227."

I don't believe the *Brown* case has any application here. Its title shows it to be a water district case and not a levee district case. In the second place it was a suit to collect taxes. In fact, it was an attempt to collect taxes which the district property owners had never voted on their property.

The court merely said that these taxes were no lien on the property because they were not voted on by the property owners as the Constitution directs. The case can be authority for no question currently before this court.

The Ellis County Levee Improvement District No. Three case is another case filed to collect delinquent taxes. The only point in it that could have any bearing on the instant case is that if real property values decline, then the tax rate must increase, so as to collect sufficient money to pay the interest on the bonds and provide a sinking fund. This case shows clearly that the "rate" and "value" can and do fluctuate as conditions change, and that in place of these factors being static they vary from year to year.

CONCLUSION

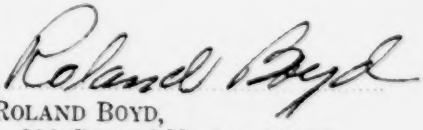
The individual landowners voted upon themselves an obligation to pay an annual tax each year through 1969. The Texas Constitution guaranteed to them that they would have to pay only the obligation they voted upon themselves. There is no law to change this obligation. They thought they were guaranteed that they would have to pay only a small amount each year and that while making these payments they could enjoy the annual harvest from their farms. Now, all of a sudden, their farms are taken from them and they are ordered to pay nineteen years' taxes at one time and the amount each is to pay can be determined only by guess work. The bonds are a district debt—they should be paid out of district assets. (The district owns a

levee system that the record in this case shows cost $199,-000.00 to build.)

If we start inventing law, where none exists, where are we going to stop? What kind of an invention are we going to indulge in to determine what part of the tax burden belongs to each farm? The statutes say we multiply the rate (amount of tax per $100 of valuation) by the "value" to determine that farm's part of the levee tax, and that the "value" is set annually. By what authority are we going to change this? The only times the question has ever reached this court were in the two *Puerto Rican* cases wherein the court held the indebtedness was a "potential" lien only until the "assessment" was made annually. How could it be otherwise? How can you have a lien on property until you have a definite and certain amount? The total amount is definite and certain, but the part of that total that each individual farm owes is not definite and certain until the annual assessment is made.

WHEREFORE the petition for a writ of certiorari should be granted.

Respectfully submitted,



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